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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1863

DONALD WINSTON HARPER, NEIL WILSON ROWE, JAMES MERRILL BURDINE, JOHN WHITE, DAVID RAY JENKINS, DAVID RAYMOND GOVUS, DONALD ALFRED BLACK, GARY REGAN TALBERT, RICHARD LEWIS JACKSON, MICHAEL BENJAMIN FORBES and ROBERT McNEILL HERRING,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Donald Winston Harper, Neil Wilson Rowe, James Merrill Burdine, John White, David Ray Jenkins, David Raymond Govus, Donald Alfred Black, Gary Regan Talbert, Richard Lewis Jackson, Michael Benjamin

Forbes, and Robert McNeill Herring respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 13, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced in the Appendix. That opinion, in its footnote 4, incorporated part of the opinion in *United States v. Coats,* 611 F.2d 37 (4th Cir. 1979), *cert. den.* April 21, 1980, No. 79-1230, and that part is also reproduced in the Appendix. The District Court did not render an opinion. Two Orders of the District Judge and six Memoranda and Recommendations of the Magistrate are also reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 13, 1980. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on March 26, 1980. It then stayed its mandate on April 2, 1980 pending the filing of an application for certiorari. The Chief Justice entered an order on April 17, 1980 extending the time for filing a petition for writ of certiorari to and including May 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the stopping, boarding and searching without probable cause or even reasonable suspicion and without a warrant of an American fishing vessel on the

high seas 800 miles off the coast of the United States by a Coast Guard cutter whose primary mission was marijuana law enforcement can be justified under the Fourth Amendment as a border search, an administrative search or a "necessary" search.

2. Whether the stopping without probable cause or even reasonable suspicion of cars traveling on a highway in the general vicinity where a raid on a marijuana unloading operation had occurred three hours earlier violated the Fourth Amendment.

3. Whether statements given by fatigued seamen who were in custody but deliberately not taken before a magistrate, who were discouraged from seeking counsel, and who were promised consideration if they cooperated and threatened with stiff sentences if they did not, were involuntary and therefore obtained in violation of due process.

4. Whether a voice identification obtained in jail of a defendant who had been arrested without probable cause should have been excluded as the fruit of the unconstitutional arrest.

5. Whether the failure of the District Judge to make a de novo determination of the Magistrate's recommendations on motions to suppress evidence — because he did not personally hear the evidence, did not even review the transcript of the hearing, and did not enter orders on most of the motions — violated Article III, the Sixth Amendment, and the Federal Magistrates Act, 28 U.S.C. section 636.

6. Whether the conspiracy to import marijuana ended with the seizure of the vessel transporting the marijuana and the arrest of her crew, or with the completion of the importation, so that persons who became involved only

thereafter in the distribution of the marijuana could not be convicted of the completed conspiracy to import it.

7. Whether the presence of three persons in a house belonging to one of them in the general vicinity of a marijuana unloading operation, or the presence three hours later on a nearby highway of two other persons driving in opposite directions in cars rented in a fictitious name used by one of the persons in the house, constituted sufficient acts to further a conspiracy to import marijuana to prove beyond a reasonable doubt that those persons were members of the conspiracy.

8. Whether a prima facie case for violating the Fifth and Sixth Amendments and the Jury Selection and Service Act of 1968, 28 U.S.C. sections 1861-1871, was established by a showing that the District Court used a list of actual voters as the sole source of names for jury selection and that practice resulted in a non-cross-sectional jury with an under-representation of black, young and low socio-economic status persons.[1]

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[1]Conditional Questions Presented: Petitioners would like to reserve their right to argue the following questions if certiorari is granted, but do not present them as reasons for issuing the writ:

(A) Whether the search of a house that followed an unconstitutional entry onto the property and occupation of the house while a search warrant and purported consent were obtained violated the Fourth Amendment because: (i) the affidavit in support of the warrant did not establish probable cause to believe that evidence would be found in the house as opposed to the vicinity outside the house, and (ii) the purported consent was given involuntarily by an elderly frail and ill man who was in custody for eleven hours but had not been given his medicine, any food or rest, and was not told of his right to refuse consent, and who, although a nominal lessee with his son of the property, did not live in or control the house, and who believed that he was consenting only to a search of the property outside of the house;

(B) Whether the identifications of petitioners Black and Burdine were sufficient to support their convictions;

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Constitutional provisions involved are Article I, Section 1, Article III, and the Fourth, Fifth and Sixth Amendments to the United States Constitution. The statutory provisions involved are 14 U.S.C. sections 89 and 143, the Federal Magistrates Act, 28 U.S.C. section 636, and the Jury Selection and Service Act of 1968, 28 U.S.C. sections 1861, 1862, 1863(a), 1863(b)(2) and (3), and 1867(a). The regulatory provision involved is 19 C.F.R. section 162.3(a) (1977). These are set out in the Appendix, as permitted by Rule 23(1)(d).

STATEMENT OF THE CASE

Petitioners were convicted in the United States District Court for the Eastern District of North Carolina, after a bench trial, of conspiracy to import marijuana into the United States in violation of 21 U.S.C. sections 952(a) and 960(a)(1). They filed pretrial motions for suppression of evidence seized in several searches and of statements given by two of them. The Magistrate held an evidentiary hearing on the suppression motions and issued Recommendations on each. Petitioners filed timely written objections to

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(C) Whether petitioner Black's statement identifying himself in response to a question from an arresting officer after his arrest and before he had been advised of his *Miranda* rights was obtained in violation of the Fifth and Sixth Amendments; and

(D) Whether a notebook seized from the house at Back Creek was improperly admitted into evidence because the Government produced no evidence to identify it or its author or to show that it related to the conspiracy and because it constituted hearsay not subject to confrontation by cross-examination.

Not all of the facts relevant to these conditional questions are detailed in this petition.

those Recommendations. The District Judge did not hear the testimony or even read the transcript of the motions hearing, A. 250A, 253A,* and issued Orders on only two of the motions, denying them.

I. Operation Stopgap

In the fall of 1977, the Drug Enforcement Administration (DEA) established a marijuana mission called "Operation Stopgap". The purpose was to coordinate the efforts of DEA, the Customs Service, the Coast Guard, the El Paso Information Center and the Immigration and Naturalization Service in an effort to seize vessels transporting marijuana from Columbia to the United States and to arrest the crews aboard the vessels. Pursuant to Operation Stopgap, the Coast Guard deployed one cutter in each of the three principal passages used by vessels traveling between South America and the United States. The plan was for DEA aircraft to observe marijuana loaded onto vessels in Columbia, follow the vessels until they headed for one of the three passages, then notify the appropriate Coast Guard Cutter to stop and board the vessel.

Pursuant to Operation Stopgap, the Coast Guard Cutter Alert was assigned to patrol the Mona Passage between Puerto Rico and the Dominican Republic. The principal purpose of the Alert's mission was marijuana law enforcement.

The Alert arrived in the Mona Passage on January 13, 1978. There it found little traffic and received no intelligence from DEA. The Captain therefore decided to

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*"A." refers to the Appendix filed in the Court of Appeals. "App." refers to the Appendix to this petition.

board every American vessel under 250 feet in length. A. 336-337, 445-446. Pursuant to that shipboard decision, the Alert made six boardings. It found no violations of any kind on the first five ships boarded.

After dark on January 26, 1978, the Alert encountered a shrimp trawler. The Alert's helicopter reported that she was a fishing vessel between seventy and eighty feet in length named the Lady Ellen, and that she was from North Carolina. By checking with the El Paso Information Center, the Alert determined that the Government had no information about the vessel. Thus, the Coast Guard had no information that the vessel or her crew was involved in any law violation or had recently crossed the American border. A. 342C, 445-446. Moreover, the Coast Guard did not have a warrant or other judicial authorization to stop, board or search any vessel. Nevertheless, the Captain of the Alert radioed the Lady Ellen to heave to, and dispatched a boarding party of four officers.

The boarding party was transported to the Lady Ellen in a small boat operated by a coxswain and two other persons. Each member of the boarding party carried a pistol and one person in the boat had a riot shotgun. Over an hour after ordering the Lady Ellen to heave to, the Coast Guard party boarded her. The boarding was hazardous because of rough seas, and succeeded only with the help of the crew on the Lady Ellen.

On board the vessel, the boarding officer identified himself to the crew, which consisted of the Captain, Paul Breslin, and petitioners Harper and Rowe,[2] and asked: "Where are you coming from and going?" Breslin an-

[2]The crew had been assembled and was acting under the direction of petitioner Govus.

swered, "You've got me. We are coming from Columbia and are loaded with marijuana." An officer advised the crew of their *Miranda* rights and then searched the vessel thoroughly to locate the marijuana. He found it in the main hold.

II. The Controlled Delivery

The Coast Guard took custody and control of the Lady Ellen and her cargo, operating her with a Coast Guard crew. Breslin, Harper and Rowe were kept on the Lady Ellen under armed guard that night. Already fatigued from twenty days at sea in rough weather, they got little sleep. The next morning, January 27, 1978, they were transferred to the Alert.

The Coast Guard knew that both the Coast Guard Boarding Manual and Rule 5 of the Federal Rules of Criminal Procedure required that their prisoners be taken before a Magistrate. They also knew that there was a Magistrate in Puerto Rico and that the ship's helicopter could take them there. Nevertheless, the Coast Guard Commander at shore headquarters made a high-level decision deliberately not to have Harper and Rowe taken before a Magistrate in order to protect plans to use them to conduct a "controlled delivery" of the marijuana. A. 302, 304-304B.

A helicopter brought DEA agent Felix Jimenez on board the Alert from Puerto Rico to arrange the controlled delivery. Customs Patrol Officer Martinez, who had been on the Alert, read the crew their *Miranda* rights. They said that they understood them and signed *Miranda* waivers.

Agent Martinez instructed the three crew members that it was necessary for them to cooperate. He and Agent

Jimenez told them that if they did cooperate in helping catch other persons, the Government would not be interested in them and "would talk to the judge in a consideration for them." A. 401. The agents also told the crew members that if they were taken to Puerto Rico they would get high bonds and stiff sentences of five to ten years, but that on the mainland the judges were more lenient in marijuana cases and would give probation. A. 162, 463. Breslin and Harper asked about a lawyer. Agent Jimenez told them that would ruin the deal – "it's either you cooperate and you make the convoy, or you go to Puerto Rico and we charge you and you can have your lawyer." A. 838. That night Harper and Rowe gave written statements that were introduced in evidence against them.[3] They also agreed to cooperate in the controlled delivery.

Several days later Breslin, Harper and Rowe were put back on the Lady Ellen under Coast Guard surveillance. Radio messages to the Lady Ellen, monitored by the Coast Guard, directed the Lady Ellen to the North Carolina area. The Government stipulated that "Breslin, Harper and Rowe imported marijuana into the United States through the Beaufort Channel at approximately 9:00 P.M. on February 4, 1978."[4] A. 99, 101. Another person then came on board the Lady Ellen and steered the vessel to Back Creek. That person wore winter clothing, including a parka with a hood mask that covered his face. Breslin later met petitioner Forbes in jail, questioned Forbes, and recognized his voice., On that basis, he identified Forbes as the person who piloted the Lady Ellen to Back Creek. He had never seen Forbes before.

[3]Breslin also gave a statement. He testified as a Government witness at trial in exchange for immunity.

[4]The Government further stipulated that "Breslin, Harper and Rowe were working on behalf of the United States from January 27, 1978 until February 5, 1978." A. 99.

The trip to Back Creek took six hours. At 3:00 A.M. the Lady Ellen dropped anchor. Several boats came alongside and a number of men boarded and unloaded the cargo. Petitioner Govus came on board and told Breslin to monitor the radio for lookouts.

After an hour, two radio calls reported small boats approaching at high speed. Govus told Breslin to get the vessel underway, and he did. A law enforcement boat stopped the Lady Ellen in the Intracoastal Waterway, however, and arrested the three crew members and four others, including Petitioners Black and Burdine, on board.

III. The Searches at Back Creek

Several law enforcement officers converged on the Back Creek area by land. They approached it on a narrow rural dirt road. State Bureau of Investigation (SBI) Agent Charles I. Overton, III and DEA Agent Edward R. Hinchman arrived first, at 4:00 A.M., followed by DEA Agent Odis Rousseau and several others. They drove until the road was blocked by an abandoned house trailer and a chain gate. On a nearby tree the property was "Posted Keep Out." They removed the chain and entered the property.

Agents Overton and Hinchman walked about 75-100 yards from where the road was blocked to a dock with a wooden shed nearby. A boat tied up at the dock had marijuana on it. Two large van type trucks were backed up within five or ten feet of the dock. A pickup camper and smaller trucks were nearby. Hinchman and Rousseau looked in the trucks and saw no contraband in them. The trucks were lined with plastic bagging held in place by duct tape.

The agents saw an elderly man who appeared frightened and feeble lying face down in a marshy area nearby. The temperature was cold and there was ice on the marsh. The man was Peter Forbes, a 65-year-old commercial fisherman who had severe high blood pressure, had suffered a stroke just six months earlier, and needed to take considerable medication every day. The agents lifted him by his arms and arrested him.

The agents saw three occupied houses in the area and approached one that was 75-100 yards from the dock. They climbed onto the porch, knocked on the door, identified themselves and asked if they could come in. A voice from inside said, "Come in." The officers opened the door and entered. Petitioners White, Jackson and Jenkins were inside wearing heavy work clothes and long rubber boots. The agents arrested all three. On a coffee table were a CB transceiver and a scanning radio receiver, which were common for people to have in that area. There were also a pair of work gloves and flashlights on the couch. Hinchman asked White to produce his wallet. He looked in the wallet and read the name "Leroy Joseph Edwards", and gave the wallet back. He asked Jackson whether he lived in the house and Jackson answered that he did.[5]

The agents set up the house as the command post for the law enforcement operation. Two or three hours later, a deputy sheriff saw petitioner Michael Benjamin Forbes standing on the roadside near the driveway to the house, where he lived, and arrested him.

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[5]The property and house were leased by Peter Forbes and his son, petitioner Michael Benjamin Forbes, for a commercial fishing operation that they ran along with Jackson. Michael Benjamin Forbes and Jackson lived in the house.

IV. "Operation Stopcars"

DEA Agent Johannesen and SBI Agent Paul Bateman drove to a place on the main highway about one mile from the dirt road to Back Creek. They parked off the road in the woods. Their purpose was to stop every car going in either direction. They did not block the road; instead they concealed themselves in the woods until a car approached, then pulled into the road and put a blue light on the dashboard of their unmarked car to signal the other car to stop.

The agents stopped several cars. In most cases, they merely noted information from the licenses of the drivers. The first car that the agents stopped was driven by a nurse. The next car was driven by petitioner Talbert. It was going northbound, in the general direction of, rather than away from, the raid site, on the route it would follow if it were coming from any number of places, including the Town of Beaufort, the several places surrounding it, and all points south. This was during daylight, three hours after the raid.

The agents pulled their cars into the road and stopped the car that Talbert was driving. They asked for his driver's license and registration. He produced his North Carolina driver's license and a rental agreement that revealed that the car had been rented from Raleigh Rent-A-Wreck by LeRoy Edwards.

Agent Johannesen testified that the agents "did not have probable cause" or even suspicion to stop the Talbert car. A. 698-699, 706. They stopped it just because they were stopping all cars. A. 705, 706.

Other officers arrived and parked their cars in the highway. Petitioner Herring approached from the north (the direction of the Town of Merriman and also the dirt

road to the house at Back Creek) driving a gray Plymouth. The officers stopped his car. They requested his driver's license and vehicle registration. He produced a Georgia driver's license and a lease agreement from Rent-A-Wreck of Raleigh, also in the name of LeRoy Edwards. Agent Bateman testified that he did not believe the officers had probable cause to stop or arrest Herring. A. 754.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT, OF OTHER COURTS OF APPEALS, AND OF STATE COURTS ON THE CONSTITUTIONALITY OF THE STOPPING AND BOARDING OF A VESSEL ON THE HIGH SEAS WITHOUT PROBABLE CAUSE OR EVEN REASONABLE SUSPICION AND WITHOUT A WARRANT.

This case presents important questions that are being raised in a rapidly increasing number of cases regarding the constitutionality of Coast Guard searching activity at sea. The decision below is in conflict with decisions of this Court and of other federal and state appellate courts on those questions.

In this case, the Coast Guard officers who stopped and boarded the Lady Ellen were engaged in a law enforcement operation concentrating on marijuana smuggling. They had no search warrant and no information identifying the Lady Ellen as involved in marijuana, fisheries, safety, documentation or any other violations. The stop occurred on the high seas 800 miles from the United States, and the Coast Guard had no information that the Lady Ellen had recently crossed any American border.

A. Conflicts as to Standards for Searches at Sea.

The decision below upholding the constitutionality of that action is in direct conflict with the decision of this Court in *United States v. Lee,* 274 U.S. 559, 562-563 (1927); see also, *Little v. Barreme,* 6 U.S. (2 Cranch) 170, 179 (1804). In *Lee,* this Court stated: "Officers of the Coast Guard are authorized . . . to board and search [American vessels on the high seas] when there is probable casue to believe them subject to seizure for violation of revenue laws . . . . The authority asserted is not as broad as the belligerent right to visit and search even without probable cause." *United States v. Lee, supra* at 562-563.[6] The decision below is also in conflict with the recent decision of the Ninth Circuit in *United States v. Piner,* 608 F.2d 358 (9th Cir. 1979), which held that a Coast Guard stopping and boarding of a boat in San Francisco Bay for a routine safety and document inspection after dark requires "at least a reasonable and articulable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer." *Id.* at 361. Similarly, in *United States v. Odneal,* 565 F.2d 598 (9th Cir. 1977), the Ninth Circuit upheld a Coast Guard stopping of a vessel for a safety inspection because it had observed dangerous safety violations. The Court said that if the stopping were not for that purpose, the Coast Guard

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[6]The decision below is also in direct conflict with a series of prohibition era decisions in the Second Circuit that followed *Lee* and held that probable cause is required for Coast Guard boardings to look for violations of the prohibition law. *Fish v. Brophy,* 52 F.2d 189, 200-201 (S.D. N.Y. 1931); *United States v. Coppolo,* 2 F.Supp. 115, 116-117 (D. N.J. 1932); *United States v. Powers,* 1 F.Supp. 458, 460 (E.D. N.Y. 1932); see also, *United States v. Hayes,* 52 F.2d 977, 978 (E.D. N.Y. 1931); *United States v. 63 Kegs of Malt,* 27 F.2d 741, 742 (2d Cir. 1928); *Arch v. United States,* 13 F.2d 382, 384 (5th Cir. 1926).

would need to have at least a "founded suspicion that the vessel was engaged in illegal activity." *Id.* at 601 n.2; see also, *United States v. Rubies,* 612 F.2d 397, 402, 404 (5th Cir. 1979), *cert. pending,* Nos. 79-1297 and 79-5954. The same Court, in *United States v. Stanley,* 545 F.2d 661 (9th Cir. 1976), upheld a Coast Guard boarding on the ground that it was a border search. *Id.* at 667. The Court indicated that away from the border or its functional equivalent the Coast Guard would need probable cause. *Id.* at 664.

Two state courts have reached similar results. *People v. Nissen,* 97 Misc.2d 1000, 412 N.Y.S.2d 999, 1003-1007 (Sup. Ct. 1979); *Casal v. State,* 375 So.2d 1077, 1078 (Fla. App. 1979). In addition, in *Klutz v. Beam,* 374 F.Supp. 1129 (W.D. N.C. 1973), a three-judge Court in the Fourth Circuit held that safety inspections of private boats may not be conducted by state officers without regard to the warrant requirement of the Fourth Amendment.

In upholding the Coast Guard search activity, the decision below appears to be in accord with Fifth Circuit decisions allowing the Coast Guard to stop and board vessels without probable cause, but that Circuit has generally done so only for safety and documentation inspections, a procedure not presented in this case.[7] The Fifth Circuit has required at least a "reasonable suspicion of illegal activity" for a stopping and boarding conducted for purposes other than a safety and documentation inspec-

[7] *United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978) (*en banc*); *United States v. Hillstrom,* 553 F.2d 209, 210 (5th Cir. 1976); *United States v. Odom,* 526 F.2d 399, 342 (5th Cir. 1976); see also, *United States v. Cadena,* 585 F.2d 1252, 1257 (5th Cir. 1978), rehg. den. 588 F.2d 100 (5th Cir. 1979); *United States v. Freeman,* 579 F.2d 942, 946 (5th Cir. 1978); *cf., United States v. One 43 Foot Sailing Vessel,* 538 F.2d 694 (5th Cir. 1976), *aff'g.* 405 F.Supp. 879, 883 (S.D. Fla. 1975).

tion. *United States v. Serrano,* 607 F.2d 1145, 1147-1148 (5th Cir. 1979); *United States v. Whitmire,* 595 F.2d 1303, 1308, 1315, 1316 (5th Cir. 1979), *cert. pending,* No. 79-375; *United States v. Cortes,* 588 F.2d 106, 110-111 (5th Cir. 1979); *United States v. Cadena, supra* at 1263 n.23; *United States v. Freeman, supra* at 342; see also, *United States v. Acosta,* ____ F. Supp. ____, ____ (S.D. Fla. 1980), 27 Cr.L.Rptr. 2100.

In a recent summary decision, however, the Fifth Circuit upheld a random Coast Guard stopping and boarding for a safety and documentation inspection where the officers also wanted to inspect for obvious customs and narcotics violations. *United States v. Erwin* (5th Cir. July 3, 1979), slip opinion at 2. The Court said that "the Coast Guard has plenary authority to board a vessel beyond the twelve-mile limit without probable cause or any particularized suspicion." *Id.*

The defendants in *Erwin* filed a petition for certiorari in this Court, but did so three days out of time. *Erwin v. United States,* No. 79-579. The Government filed a Brief in which it took the following position:

> "[W]e do not oppose the petition for certiorari in light of the substantial importance of the issue presented and the uncertainties created by this Court's decision in *Prouse* and the Ninth Circuit's decision in *Piner.*" *Id.,* Brief for the United States at 9.

The Government suggested, however: "The Court may nevertheless wish to consider whether review should be declined on account of the untimeliness of the petition in this case." *Id.,* Brief for the United States at 9 n.6. On February 19, 1980 this Court denied certiorari without comment. *Id.,* 100 S.Ct. 1014 (1980).

This Court should grant certiorari in this case to resolve the conflict between the Fourth and perhaps the Fifth Circuits on the one hand and the Second and Ninth Circuits and the state courts on the other on this issue, which the Government in its *Erwin* brief correctly characterized as an important one.

B. Conflicts as to Border Searches.

The decision below upheld the stopping and boarding under an amalgam of theories: border search, administrative or regulatory search, and high seas or necessary search. None of those theories is justified on the facts. See Comment, 93 Harv. L.Rev. 725, 750, 751 (1980).

The Court of Appeals said: "[W]e hold that the stop and boarding was lawful, absent any particularized suspicion of criminal activity aboard, because it was undertaken as a systematic 'border' stop and inquiry." App. 4a-5a. That rationale is in conflict with the basic principle of border search doctrine.

The stopping and boarding was conducted on the high seas more than 800 miles and ten days sailing from the border — outside of the United States — not at the border or its functional equivalent. See *Almeida-Sanchez v. United States,* 413 U.S. 266, 272-273 (1973). The "critical fact [for a border search] . . . that the [person or item] cross the border and enter this country," *United States v. Ramsey,* 431 U.S. 606, 616 (1977), was not established. See *United States v. Whitmire, supra* at 1307-1308. The officers had no reason to believe that there had been a crossing into the country and certainly not a recent one. The American nationality of the vessel suggested that it may have exited the country at some unknown time in the past but the officers had no reason even to suspect that it carried contraband at that time.

The decision below, concluding that the stopping and boarding could be justified as a border search "albeit 800 miles at sea," App. 7a, without citing a single supporting precedent effectively declared international waters to be the equivalent of the American border, thus exempting all searches at sea from the Fourth Amendment. The effect is that Coast Guard boardings of American vessels at sea are subject to no standards or restrictions. This Court has never approved unconstrained searches of that kind or suggested any rationale for doing so. See *Delaware v. Prouse,* 440 U.S. 648, 661 (1979).

C. Conflicts as to Administrative Searches.

The stopping and boarding was a major time-consuming operation conducted by armed officers at night under hazardous conditions, including an interrogation of the master and a search throughout the vessel, for the principal purpose of detecting violations of the marijuana laws. It was not an administrative or regulatory search for enforcement of the navigation, safety or administrative laws. See *Torres v. Puerto Rico,* 442 U.S. 465, 473 (1979). In the only two cases in which this Court has upheld an administrative search on that ground, the search was conducted solely for the purpose of enforcing extraordinary regulatory objectives. *United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970); see *Almedia-Sanchez v. United States,* 413 U.S. 266, 271 (1973); see also, *Marshall v. Barlow's Inc.,* 436 U.S. 307 (1978). Moreover, the administrative or regulatory search doctrine does not authorize a forcible search. It has only been used to uphold statutes making it an offense to refuse admission to an inspector. *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 77 (1970).

The decision to stop and board every United States vessel under 250 feet in length was made solely by the officer in the field, the Captain of the Coast Guard Cutter. Operation Stopgap assigned to the Cutter the responsibility of stopping only vessels that it had probable cause to believe were smuggling marijuana. The probable cause was to be obtained primarily by DEA air surveillance, and also by earlier intelligence about the vessels, or by the suspicious circumstances of the vessels. The Captain decided on his own to board all vessels because the DEA had not notified him of any vessels to stop and because there was little traffic in the Mona Passage.

D. Conflicts as to "Necessary" Searches.

The Government made no showing of a critical need for authority to conduct boardings for either criminal law or safety and documentation purposes without a warrant and probable cause or reasonable suspicion. Cf., *Almeida-Sanchez v. United States, supra* at 273 n.5. One central teaching of *Delaware v. Prouse,* 440 U.S. 648, 658-661 (1979), is that the necessity must be demonstrated, not merely asserted, to have any effect on a Fourth Amendment analysis.

The only official governmental position on the appropriate standard for Coast Guard boardings is the Treasury Department Regulation in 19 C.F.R. section 162.3(a) (1977), which provides:

> "A customs officer [which includes a Coast Guard officer enforcing the Customs law, 14 U.S.C. §89(b), 19 U.S.C. §§1401(i), 1709(b)], for the purpose of examining the manifest and other documents and papers and examining, inspecting

> and searching the vessel, may at any time go on board: . . . .
>
> "(2) Any American vessel on the high seas, when there is probable cause to believe that such vessel is violating or has violated the laws of the United States . . . ."

14 U.S.C. section 89(a) authorizes the Coast Guard to stop and board American vessels on the high seas, but it does not define the circumstances under which that authority may be exercised. The statute provides that Coast Guard officers "may at any time go on board of any vessel" and the regulation specifies the standard for the exercise of that authority by declaring that they "may at any time go on board any American vessel on the high seas when there is probable cause." The Government's position in *United States v. Lee, supra,* was also that probable cause was required.

By upholding the Coast Guard conduct as constitutional, the decision below yielded to the predictable law enforcement pressures for relaxation of Fourth Amendment standards in order to make it easier to convict marijuana importers. This Court, by contrast, has repeatedly refused to dispense "with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement." *Torres v. Puerto Rico,* 442 U.S. 465, 474 (1979). Thus, this Court has refused to abandon Fourth Amendment requirements in connection with threats to domestic security, *United States v. United States District Court,* 407 U.S. 297 (1975), and the smuggling of firearms, explosives and narcotics, *Torres v. Puerto Rico, supra,* and aliens, *Almedia-Sanchez v. United States, supra* at 273-274, as well as with regard to murder, arson,

rape, robbery and burglary. *E.g., Mincey v. Arizona,* 437 U.S. 385, 394 (1978); *Michigan v. Tyler,* 436 U.S. 499, 508 (1978). No reason appears why it should do so with regard to alleged importation of marijuana.

II.

THE STOPPING WITHOUT PROBABLE CAUSE OR EVEN REASONABLE SUSPICION OF CARS IN THE GENERAL VICINITY WHERE A MARIJUANA UNLOADING OPERATION HAD OCCURRED THREE HOURS EARLIER RAISES AN IMPORTANT FOURTH AMENDMENT QUESTION.

This Court has repeatedly held that the non-consensual search of an automobile that is not in police custody may be accomplished only when the officers have probable cause or at least " 'some quantum of individualized suspicion.' " *Delaware v. Prouse,* 440 U.S. 648, 654-655 (1979); *Almeida-Sanchez v. United States,* 413 U.S. 266, 270 (1973); *Chambers v. Maroney,* 399 U.S. 42, 47-48, 49 (1970); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 221-222 (1968); *Carroll v. United States,* 267 U.S. 132, 159-160 (1925). The Court has applied that requirement to the stopping of an automobile as well as the searching of it. *Henry v. United States,* 361 U.S. 98, 103 (1959); *Brinegar v. United States,* 338 U.S. 160, 176 (1949); see also, *Rios v. United States,* 364 U.S. 253, 261-262 (1960); *Potter v. United States,* 362 F.2d 493, 499 (5th Cir. 1966). "Automobile or no automobile", the Court said in a case involving the validity of the stopping of one, "there must be probable cause for a search." *Almedia-Sanchez v. United States,* 413 U.S. 266, 269 (1973). The Court stated recently that "probable cause has not been abandoned as a requirement for stopping and searching an automobile." *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 315 n.10 (1978).

The probable cause (or suspicion) must be "individualized", *Delaware v. Prouse, supra,* that is, directed towards the particular individual or vehicle to be searched or seized. *Ybarra v. Illinois,* 100 S.Ct. 338, 342 (1979); *Brown v. Texas,* 443 U.S. 47, 51-52 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 555-556 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 882 (1975).

In this case, two law enforcement officers decided to stop every car traveling on the main highway in the vicinity of the raid site regardless of whether the car was going towards or away from the raid site and regardless of whether the officers had any reason to single out the particular car. They decided to hide in the woods in their unmarked car, wearing plain clothes, and drive into the highway to surprise and stop each car that passed. Pursuant to that plan, the officers stopped several cars. Two of the cars that they stopped were driven by petitioners Talbert and Herring. They were traveling separately in opposite directions. The stopping occurred three hours after the raid. As the officers admitted, they had no reason to single out the Talbert or Herring cars from the rest of the traffic on the highway that morning, and certainly did not expect any suspects to be driving towards the raid site so long after the raid.

The decision below upheld the stopping of the cars on the following rationale:

> "A serious crime had been committed involving numerous participants, some of whom were known to be fleeing the scene along a route reasonably expected to be used for their escape. Stopping all cars there was, under the circumstances, a necessary means of law enforcement, and as such, justifies the minimal intrusion on privacy rights posed to passing motorists." App. 13a.

That holding ignored the Fourth Amendment requirement for an individual justification for the intrusion on the privacy of any particular individual, and did so simply because of an asserted law enforcement need. The officers had only a generalized suspicion that some persons traveling on the highway might have been escaping from the raid site. Even in a high crime area, the officers must have information singling out a specific individual or vehicle. *Torres v. Puerto Rico,* 442 U.S. 465, 467 (1979); *Brown v. Texas,* 443 U.S. 47 (1979); *Almeida-Sanchez v. United States, supra* at 273 n.5. Citizens do not forfeit their Fourth Amendment rights because, however innocently, they happen to be in the vicinity of criminal activity involving several persons.[8] In holding otherwise, the decisions below is in conflict with the decisions of other courts of appeals. *E.g., United States v. Carrizola-Gaxiola,* 523 F.2d 239, 241 (9th Cir. 1975); see also, *United States v. Montgomery,* 561 F.2d 875, 886 (D.C. Cir. 1977). Even if a law enforcement need could justify such dragnet stops in some circumstances, the decision by individual agents in the field, rather than by supervisory officials, without "a plan embodying explicit, neutral limitations on the conduct of individual officers," *Brown v. Texas, supra* at 51, using unmarked cars and wearing plain clothes, hiding and driving out to surprise passing cars going in *either* direction, without advance notice by prominent signs, does not qualify as an appropriate method to accomplish the purpose. *Cf., Delaware v. Prouse, supra* at 661, 663; *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976).

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[8]The requirement that probable cause be particularized cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Ybarra v. Illinois, supra.*

III.

BECAUSE THE STATEMENTS OF HARPER AND ROWE WERE INVOLUNTARY, THE DECISION BELOW UPHOLDING WITHOUT DISCUSSION THEIR USE AT TRIAL IS IN CONFLICT WITH SEVERAL DECISIONS OF THIS COURT.

Petitioners Harper and Rowe raised and fully briefed in the Court of Appeals the question of the involuntariness of their statements. The decision below rejected their arguments without discussion, saying simply: "We acknowledge the numerous issues raised by various appellants but find no reversible error in any of them." App. 14a.

The involuntariness of the statements of Harper and Rowe was established by the totality of six circumstances. Harper and Rowe: (1) were fatigued from their voyage in rough weather; (2) were confined in a restricted area and got little sleep; (3) were deliberately not taken before a Magistrate although the Coast Guard had a helicopter available to transport them to one in Puerto Rico; (4) were promised "consideration" in connection with the charges against them if they cooperated; (5) were threatened with stiff sentences in Puerto Rico if they did not cooperate; and (6) were told, when they asked about a lawyer, that if they wanted a lawyer they could not have "the deal." The decision below upholding without discussion the use of those statements is in conflict with several decisions of this Court. *E.g., Brady v. United States,* 397 U.S. 742, 753 (1970); *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961); *Haynes v. Washington,* 373 U.S. 503, 505-515 (1963); *Lynum v. Illinois,* 372 U.S. 528, 534 (1963); *Mallory v. United States,* 354 U.S. 449 (1957); *McNabb v. United States,* 318 U.S. 332 (1943); *Bram v. United States,* 168 U.S. 532, 542-543 (1897).

The Government argued that the admission of these statements constituted harmless error. Brief for Government at 75. "But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process 'even though there is ample evidence aside from the confession to support the conviction.' " *Mincey v. Arizona,* 437 U.S. 385, 385, 398 (1978).

IV.

THE USE IN EVIDENCE OF THE VOICE IDENTIFICATION OF PETITIONER MICHAEL BENJAMIN FORBES WHICH WAS THE FRUIT OF HIS ARREST WITHOUT PROBABLE CAUSE RAISES AN IMPORTANT QUESTION LEFT UNANSWERED THIS TERM IN *UNITED STATES V. CREWS.*

Petitioner Michael Benjamin Forbes was arrested by a deputy sheriff three or four hours after the raid. He was on the road leading to his house, where the deputy sheriff knew that he lived. The deputy sheriff had no information connecting Forbes with the marijuana operation and therefore arrested him without probable cause.

The evidence against Forbes was developed later in the day. Forbes was jailed with Breslin, who was then a Government informer. Breslin questioned Forbes and identified Forbes by his voice alone as the pilot wearing the cold weather mask who had met the Lady Ellen and steered her to Back Creek. He identified Forbes in court solely on the basis of having recognized his voice in jail and having seen his face at that time. That identification was inadmissible as the fruit of an unconstitutional arrest. *Dunaway v. New York,* 442 U.S. 200 (1979); *Brown v. Illinois,* 442 U.S. 590 (1975); *Wong Sun v. United States,* 371 U.S. 471 (1963).

In *United States v. Crews,* 100 S.Ct. 1244 (1980), this Court reaffirmed that "the exclusionary sanction applies to any 'fruits' of a constitutional violation," *id.* at 1249, including photographic and lineup identifications resulting from an unconstitutional arrest ("both of which", the Court said in that case, "are conceded to be suppressible fruits of the Fourth Amendment violation . . . ." *Id.* at 1250). *Crews* held, however, that a courtroom identification by a witness who formed her identification of the defendant at the time of the crime and before his arrest was independent of the later violation of the defendant's Fourth Amendment rights. In the present case, however, Breslin's in-court identification was based solely on his seeing Forbes in jail while hearing his voice. Accordingly, this case raises the precise issue that the Court did not have to reach in *Crews.*

V.

THE FAILURE OF THE DISTRICT JUDGE TO MAKE A DE NOVO DETERMINATION OF THE MAGISTRATE'S RECOMMENDATIONS ON THE SUPPRESSION MOTIONS RAISES IMPORTANT QUESTIONS UNDER THE FEDERAL MAGISTRATES ACT AND THE CONSTITUTION.

The Federal Magistrates Act prohibits a Magistrate from determining a motion to suppress evidence in a criminal case but authorizes him to conduct evidentiary hearings on such a motion and to submit to the Judge proposed findings of fact and recommendations for disposition by the Judge. 28 U.S.C. §636(b)(1)(B). The Act specifies: "A judge of the Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b)(1). The Act confers a limited role on the Magistrate. He "may do no more than propose a recom-

mendation," which does not carry even presumptive weight. *Mathews v. Weber,* 423 U.S. 261, 270-271 (1976). "The authority – and the responsibility – to make an informed, final determination, we emphasize, remains with the judge." *Id.* at 271.

The Magistrate conducted an evidentiary hearing for eleven days on the suppression motions in this case and filed his recommendations by June 22, 1978. Petitioners filed timely objections to them by June 30, 1978. The District Judge did not hear any of the evidence presented in connection with the suppression motions and did not even review the transcript of the motions hearing. Nevertheless, on July 3, 1978, he issued an order denying the motion challenging the search of the Lady Ellen at sea. On July 5, 1978, the District Judge entered an order denying in part and granting in part the motion challenging the stopping of the cars driven by Talbert and Herring.

The District Judge issued no orders with regard to the rest of the suppression motions. Thus, there is no disposition by the District Judge of those motions, as required by 28 U.S.C. section 636(b)(1)(B). *Cf., Swisher v. Brady,* 438 U.S. 204, 208, 209, 210, 216 (1978). Even as to the two motions on which the District Judge did issue orders, those orders did not comply with the Act because the District Judge did not make a de novo determination after petitioners filed objections to the Magistrate's recommendations.

In *United States v. Raddatz,* 592 F.2d 976 (7th Cir. 1979) the Seventh Circuit held that Due Process requires the District Judge as the trier of fact in a hearing on a motion to suppress evidence, to hear the evidence personally "in order to ensure a meaningful determination of the facts." *Id.* at 982; see also, *United States v. Bergera,* 512 F.2d 391, 393-394 (9th Cir. 1975). This Court granted cer-

tiorari in *Raddatz,* No. 79-8, and oral argument was held on February 25, 1980. Like *Raddatz, id.* at 983, the present case was a criminal case in an Article III Court in which credibility evidence was central to the determination of material issues of fact. Due Process and Article III entitled petitioners to have those issues determined by the District Judge and only after personally observing and hearing the witnesses, testify.

In this case, however, not only did the District Judge fail to hear the evidence personally, he failed even to read the transcript of the evidence taken before the Magistrate. The Fourth, Fifth and Ninth Circuits have held that the "judge must himself review the entire record before the District Court, consider the magistrate's report, and satisfy himself that the recommended disposition is fair and proper." *Bowman v. Bordenkircher,* 522 F.2d 209, 210 (4th Cir. 1975); *Campbell v. District Court,* 501 F.2d 196, 206 (9th Cir. 1974); *McKinney v. Parsons,* 488 F.2d 452, 453 (5th Cir. 1974). The District Judge did not comply even with that standard.

VI.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF TWO OTHER COURTS OF APPEALS ON WHETHER THE CONSPIRACY TO IMPORT MARIJUANA ENDED BEFORE PETITIONERS, TALBERT, HERRING, BLACK, BURDINE, JACKSON, WHITE, JENKINS AND FORBES JOINED IT.

The indictment charged petitioners with a conspiracy only to import marijuana. That conspiracy ended on January 26, 1978, with the seizure of the Lady Ellen at sea and the arrest of her crew. The cooperation of the crew in the controlled delivery was "not in any sense a furtherance of

the criminal enterprise. It is rather a frustration of it." *Fiswick v. United States,* 329 U.S. 211, 217 (1946).

The decision below is in conflict with the *Fiswick* principle and in direct conflict with a First Circuit decision that applied the *Fiswick* principle in circumstances analogous to those present here. *United States v. Izzi,* 613 F.2d 1205 (1st Cir. 1980). In that case, the evidence established a conspiracy to import heroin among five persons. One of them agreed after he was arrested to work undercover for the DEA. In that role he arranged a $19,000 purchase of heroin by the original conspirators from one Izzi, who also agreed to make further sales to the conspiracy. The First Circuit reversed Izzi's conviction, holding that the conspiracy had terminated before Izzi got involved. *Id.* at 1209. The Court explained that the transaction with Izzi was not a continuance of the conspiracy to import heroin, but rather a government plan to obtain evidence in which the prime mover was not a conspirator but the DEA acting through the undercover agent. *Id.*

An additional conflict arises if the conspiracy to import marijuana did not end at sea, because it certainly ended when "Breslin, Harper and Rowe imported marijuana into the United States through the Beaufort Channel at approximately 9:00 on February 4, 1978." That is when the importation was complete.[9] A conspiracy ends with the success, failure or abandonment of its objective.[10]

[9] *Cunard S.S. Co. v. Mellon,* 262 U.S. 100, 122 (1923); *United States v. Morello,* 125 F.2d 631, 635 (2d Cir. 1957); *Palmero v. United States,* 112 F.2d 922, 924-925 (1st Cir. 1940); *Alksne v. United States,* 39 F.2d 62, 68 (1st Cir. 1930); *United States v. Lee Foo Yung,* 46 F.Supp. 147 (E.D. N.Y. 1942).

[10] *United States v. Kissel,* 217 U.S. 601, 608 (1910); *Brown v. United States,* 150 U.S. 93, 98 (1893); *Logan v. United States,* 144 U.S. 263, 309 (1892); see also, *Anderson v. United States,* 417 U.S. 215, 218

In *United States v. Alfrey*, 612 F.2d 180, 186 (5th Cir. 1980), the Fifth Circuit held that a person who boarded a vessel that had already entered the United States carrying marijuana could not be convicted of conspiracy to import the marijuana because the crime of importation of marijuana had already been committed. The decision below is in conflict with *Alfrey* because it upheld the convictions of these petitioners although no evidence showed any involved by them in the conspiracy until after the importation was completed. Petitioner Forbes boarded the vessel ten days after it had been seized at sea and shortly after it completed the importation. Petitioners Black and Burdine did not board the vessel until the early morning after the importation was completed. Petitioners Talbert, Herring, Jackson, White and Jenkins were not implicated until even later that morning.

VII.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE IMPORTANT QUESTION OF THE REQUISITE PROOF OF PARTICIPATION IN A CONSPIRACY.

It is axiomatic that "mere association with other persons involved in a criminal enterprise is insufficient to prove participation in a conspiracy." *United States v. Gutierrez*, 559 F.2d 1278, 1280 (5th Cir. 1977). "Mere association and activity with a conspirator does not meet the test . . . .

(1974); *Grunewald v. United States*, 353 U.S. 391, 397-402 (1957); *Lutwak v. United States*, 344 U.S. 604, 616-617 (1953); *Krulewitch v. United States*, 336 U.S. 440, 442-444 (1949); *Fiswick v. United States*, *supra* at 216-217; A.L.I. Model Penal Code §5.03(7)(a) (Official Draft 1962). Evidence of a defendant's membership in a conspiracy to possess or distribute contraband does not show guilt of a conspiracy to import the contraband. *Cf.*, *United States v. Cadena*, 585 F.2d 1252, 1256 (5th Cir. 1978); *United States v. Rodriguez*, 585 F.2d 1234, 1247 (5th Cir. 1978); see also, *Bollenbach v. United States*, 326 U.S. 607, 611 (1946).

Mere knowledge of the existence of a conspiracy is not sufficient to sustain a conviction." *United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1974). The Government must prove both knowledge of the illegal purpose of the conspiracy charged and acts that are undertaken to further *that* purpose. *United States v. Falcone,* 311 U.S. 205, 210-211 (1940). Yet the most that the evidence showed against these petitioners was their presence an association with other persons in the vicinity of the importation. "Proximity to the crime or even actual presence at the scene of the crime is not sufficient." *United States v. Rodriguez,* 585 F.2d 1234, 1245 (5th Cir. 1978); see also, *United States v. Romano,* 383 U.S. 136, 141 (1965); *cf., County Court of Ulster Cty. v. Allen,* 442 U.S. 140, 158-159 n. 16 (1979). "[A] person's mere propinquity to others; independently suspected of criminal activity does not, without more, give rise" even to probable cause.. *Ybarra v. Illinois,* 100 S.Ct. 338, 342 (1979).

There is less evidence against these petitioners than against the defendants in several cases where federal courts have found the evidence insufficient to connect them with an alleged conspiracy.[11] In *United States v. Gutierrez,* 559 F.2d 1278 (5th Cir. 1977), Government officers watched a person who sold heroin to an undercover agent on three occasions meet with his uncle at the uncle's house on all three occasions before consummating the transaction by turning over the heroin. In addition, the officers found in the uncle's house $400 in marked bills that the undercover agents paid the nephew for heroin. The

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[11]See, *e.g., United States v. Burgos,* 579 F.2d 747, 749 (2d Cir. 1978); *United States v. Dyar,* 574 F.2d 1385, 1388-1389 (5th Cir. 1978); *United States v. Littrell,* 574 F.2d 828, 833-835 (5th Cir. 1978);*United States v. Caro,* 569 F.2d 411, 417-419 (5th Cir. 1978); *United States v. Stroupe,* 538 F.2d 1063, 1065-1066 (4th Cir. 1976); *United States v. Baker,* 499 F.2d 845, 847-849 (7th Cir. 1974).

Court held the evidence insufficient against the uncle. *Id.* at 1281.

In *United States v. Duckett,* 550 F.2d 1027 (5th Cir. 1977), three persons flew from the Bahamas to Miami with a red suitcase carrying heroin. Duckett was at the Bahamas airport at the same time as they; he asked them for a key; he had earlier been in the house of one of them when heroin was present; and he used the same alias as another of them. The Court held:

> "The joint presence of the defendant and the conspirators at the airport and the pre-existing relationship between the parties is insufficient alone to prove beyond a reasonable doubt that defendant had a part in the conspiracy. . . . Thus the fact that Duckett approached Gray and Gaston for a key and that Gaston possessed papers with both Duckett's true name and alias do not provide a legitimate basis for inferring his participation in a conspiracy to import heroin." *Id.* at 1030.

In *United States v. Valenzuela,* 596 F.2d 824 (9th Cir. 1979), the defendant was arrested in her own home – shared with her husband – where the officers also found heroin. When the officers came to the door to execute a warrant she attempted to push the door shut. The Court reversed her convictions for possession with intent to distribute and conspiracy. *Id.* at 830-831.

In *Ramirez v. United States,* 363 F.2d 33 (9th Cir. 1966), the defendant was present and knew what was going on when X bought marijuana in Mexico. Y also bought marijuana in Mexico but defendant was not present at that time. X and Y put their marijuana in Y's car and Y drove it across the border. The defendant and X

walked across the border. The defendant never touched the marijuana. The Court held the evidence insufficient to convict the defendant of aiding and abetting. *Id.* at 35; see also, *United States v. Peterson,* 416 F.2d 1216, 1220-1221 (9th Cir. 1969).

The decision below is in conflict with those decisions of the Fifth and Ninth Circuits. The principal evidence against Jackson, White and Jenkins was their presence in the house on Back Creek at 5:00 A.M., wearing heavy work clothes and long rubber boots. Jackson lived in the house; his presence in his own house can hardly evidence his involvement in criminal activity occurring in the vicinity. The presence of White and Jenkins as guests of Jackson is no more incriminating. The fact that the three were dressed for outdoor work at 5:00 A.M. is not a suspicious circumstance in a fishing community.

The house contained a CB transceiver and a scanning radio receiver. The evidence showed, however, that it was common for people in that area to have such equipment.

The conduct of Jackson, White and Jenkins was consistent with innocence. They had left the door unlocked, and invited the agents into the house when the agents requested permission to enter. Although the agents had been on the grounds for an hour before they came to the house, petitioners made no effort to flee or hide anything. They were cooperative with the agents, answering their questions and producing identification for them.

Talbert and Herring were stopped in automobiles proceeding in opposite directions on the highway about a mile from the dirt road leading to the raid site three hours after the raid. Both were driving vehicles rented in a fictitious name from the same agency, and White was arrested in the house at Back Creek carrying identification using that fictitious name. That evidence may establish an association

among these persons, but that association does not show the guilty involvement of any of them in the importation scheme. See *United States v. Duckett, supra* at 1030.[12]

In arguing the sufficiency of the evidence the Government relied on the Fifth Circuit's former "slight evidence" rule. Brief for the Government in the Court of Appeals at 83. That rule originated in *Tomplain v. United States,* 42 F.2d 202 (5th Cir.), cert. den., 282 U.S. 886 (1930), but was rarely used until recently. Comment, 64 Va. L.Rev. 881, 881 (1978). The Fifth Circuit overrruled it in *United States v. Malatesta,* 590 F.2d 1379 (5th Cir. 1979) (*en banc*): "The 'slight evidence' rule as used and applied on appeal in conspiracy cases should not have been allowed to worm its way into the jurisprudence of the Fifth Circuit. It is accordingly banished . . . ." *Id.* at 1382. The Fifth Circuit then held that "the correct standard of review is *substantial evidence,* it being understood, of course, that the evidence is to be viewed in the light most favorable to the government." *Id.* This Court has since reaffirmed that

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[12]The only other evidence relied on by the Government to build a case against Talbert or Herring was the notebook found in the house at Back Creek. The inadmissibility of this notebook is one of the conditional questions presented in this case. The notebook was not, in any event, probative against Talbert or Herring.

The name Talbert is not in the notebook. Talbert's first name, Gary, is not in the notebook either. His middle name, "Regan", is close in spelling to "Reagan", a name that enjoyed five scattered and innocuous references among the many pages and many names in the notebook. The Government made no effort to show that they related to the smuggling conspiracy, and presented no evidence regarding the identity of the person who wrote the name "Reagan", let alone that he knew Talbert or intended the name "Reagan" to refer to him.

There are several references to "Neil", also in innocent or ambiguous contexts, in the notebook. One conspirator was, of course, Neil Rowe. Herring's first name is Robert, not Neil. His middle name is McNeill, but there was no evidence that he was ever called by his middle name, let alone by the short form "Neil".

"the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 318 (1979); see also, *Glasser v. United States,* 315 U.S. 60, 80 (1942); see generally, *United States v. Alvarez,* ____ F.2d ____, ____ (5th Cir. 1980), 26 Cr.L.Rptr. 2465.

VIII.

THE DECISION BELOW RAISES IMPORTANT QUESTIONS UNDER THE JURY SELECTION AND SERVICE ACT OF 1968, 28 U.S.C. SECTIONS 1861-1871, REGARDING:

(A) WHETHER A LIST OF ACTUAL VOTERS MAY BE USED AS THE SOLE SOURCE OF NAMES FOR FEDERAL JURY SELECTION WHEN THAT PRACTICE RESULTS IN JURIES IN WHICH COGNIZABLE GROUPS ARE UNDER-REPRESENTED, AND

(B) WHAT STATISTICAL SHOWING CONSTITUTES A *PRIMA FACIE* CASE THAT FEDERAL JURY SELECTION PRACTICES RESULT IN JURIES IN WHICH COGNIZABLE GROUPS ARE UNDER-REPRESENTED.

The jury plan for the Eastern District of North Carolina provides that grand and petit juries shall be chosen only from lists of actual voters in the most recent presidential election. Those lists contain the names of only 38% of the population eligible for jury service because only that percentage voted in the 1976 election. As the Table in Appendix L shows, the District Court's reliance on that exclusive list resulted in the under-representation of black and low socio-economic status citizens on the grand and

petit juries in the District. The plan contains no provision for access to "some other source or sources in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862," which declare the right to juries selected at random from a fair cross section of the community and the right not to be excluded from jury service on account of race or economic status. 28 U.S.C. §1863(b)(2). See *United States v. Grant,* 475 F.2d 581, 581 (4th Cir. 1973) (Winter, J., dissenting from denial of rehearing). Accordingly, before trial petitioners challenged the composition of those juries on constitutional and statutory grounds and offered to prove the statistics shown in Appendix L. The District Court refused the offer of proof and denied the challenge.[13] Later, in *United States v. Coats,* 611 F.2d 37 (4th Cir. 1979), *cert. den.* April 21, 1980, No. 79-1230, the District Court allowed into evidence essentially the same data and denied a similar challenge. On appeal, the Fourth Circuit upheld that ruling, and in the present case the Fourth Circuit upheld the denial of the jury challenge on the basis of its decision in *Coats.* App. 14a n. 4.

The Fourth Circuit and the District Court have known at least since 1973 when *United States v. Grant, supra,* was decided that its exclusive use of lists of actual voters resulted in under-representation of blacks on juries. Yet they have taken no action to "prescribe other sources to supplement the voter lists," S. Rep. 891, 90th Cong., 1st Sess. 27 (1967), including what the Senate Report called "the preferred source, the registration lists". *Id.*

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[13]After the District Court denied the challenge, Petitioners waived jury trial. The District Court, however, expressly permitted Petitioner Herring to perserve his challenge to the composition of the petit as well as the grand juries in the District, and Herring waived jury trial in reliance on that procedure.

In its decisions in this and the *Coats* cases, the Fourth Circuit appeared to accept the proposition that supplementation of names by use of alternative lists would be required upon a "showing that voter lists do not represent a fair cross-section of the community." *United States v. Coats, supra* at 41, App. 16a. The Court did not discuss why it believed "that showing has not been made here," *id.*, App. 17a, and instead cited two cases that held that " 'neither the Act nor the Constitution require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population' " *United States v. Test,* 550 F.2d 577, 586 n.8 (10th Cir. 1976) (*en banc*), *cert. den.,* 439 U.S. 1074 (1977); *United States v. Ross,* 468 F.2d 1213, 1216 (9th Cir. 1972), *cert. den.,* 410 U.S. 989 (1973).

Although the Fourth Circuit suggested that a demonstration of under-representation as well as systematic exclusion of a cognizable group would establish a violation of the statute, that reasoning suggests that it was requiring proof of intent to discriminate. Although discriminatory intent might be an appropriate standard in an Equal Protection analysis, *cf., Washington v. Davis,* 426 U.S. 229, 239 (1976), and a standard of systematic exclusion might be appropriate in a Sixth Amendment analysis, *Duren v. Missouri,* 439 U.S. 357, 366 (1979); *Taylor v. Louisiana,* 419 U.S. 522, 531 (1975), they have no place in consideration of whether the remedial *statute* has been violated. *Cf., City of Rome v. United States,* 48 U.S. Law Week 4463, 4468-4469 (1980); *Washington v. Davis, supra* at 238. Although voter lists are one convenient source for jury selection procedures, the end sought is not the use of voter lists but juries composed of a fair cross-section of the community. *Broadway*

v. Culpepper, 439 F.2d 1253, 1257 (5th Cir. 1971). "(E)xcluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial", *Taylor v. Louisiana, supra* at 530, if such exclusion results from the failure of such groups to vote in the same proportions as other groups any more than if it results from their failure to volunteer for jury service. *Id.* The command of the statute for supplementation from other lists has been ignored by the District Court. That default presents an important issue regarding federal judicial administration that needs to be decided by this Court.[14]

The statute prohibits jury exclusion on the basis of race or economic status. 28 U.S.C. §1863(b)(2); *see also, Thiel v. Southern Pacific Co.,* 328 U.S. 217, 223 (1946) (daily wage earners). The District Court jury selection system, however, resulted in under-representation of blacks, of persons in blue collar and service occupations and of persons with no college education. The table in Appendix L, using categories reported by the Bureau of the Census, shows that on a computation of "absolute disparity" blacks are under-represented on the grand jury by 10.2% and the petit jury by 11.7%, that blue-collar and service workers are under-represented on the two juries by 23.1% and 26.5% respectively, and that persons with no college are under-represented by 32.3% and 30.8% respectively.

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[14]Even voter registration lists may be so unrepresentative of the community as to require supplementation. Indeed, only 64% of the eligible population was even registered to vote in the District. Use of the registration lists would thus be an improvement over use of the voter lists, and the fact that they might not be a complete solution does not justify holding that the District Court need not strive to empanel more broadly representative juries, as the Fourth Circuit contended. *United States v. Coats, supra,* App. at 16a.

Using the computation of "comparative disparity"[15] the under-representation is even more stark: blacks on the grand jury by 33.8% and on the petit jury by 42.1%; blue-collar and service workers on the grand jury by 45.2% and on the petit jury by 52.4%; and persons with no college on the grand jury by 32.3% and on the petit jury by 30.8%.

In *Swain v. Alabama,* 380 U.S. 202 (1965), this Court held: "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10%." *Id.* at 208-209. Under the statute, however, purposeful discrimination need not be shown and this case presents an opportunity for the Court to determine the measures and standards for proof of a *prima facie* case of deviation from the cross-section ideal mandated by Congress. The Table in Appendix M shows some of the varying standards that the federal courts are employing, and illustrates the need for review by this Court.

Even if the absolute disparity measure is used, however, this case presents important questions about the tolerable standards of deviation in representativeness. The decision below upheld without discussion a deviation of 10.2% (grand jury) and 11.7% (petit jury) in a racial category. Such disparity is inconsistent with the statutory objective even if it is within or close to the constitutional limits. That racial deviation in this case is aggravated by the concurrent under-representation of socio-economic groups defined in terms of occupational categories and degree of

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[15]For an explanation of the "comparative disparity" measure and why it is more meaningful than "absolute disparity," see the Petition for Certiorari in *Masenky v. United States,* No. 79-1433, at 11-18. That petition also discusses as a third possible measure the "statistical significance" test.

education, by percentages in the range of 23.1% to 27.1%. The corollary of those figures is that professionals and managers are over-represented on the grand jury by 125.9% and on the petit jury by 180.9%, and that people with some college education are over-represented by over 160%. See Appendix L.

These statistics are certainly sufficient to shift the burden to the Government to show that it has a legitimate interest that is "manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group." *Duren v. Missouri, supra* at 367-368. If it cannot do so, there is no reason to tolerate such substantial deviations in the face of a statute commanding a high standard of representativeness and recommending supplementation of voter lists with other lists containing names of a broader spectrum of the community. The cure will not impose a hardship on the courts. Congress expressed a preference for voter registration lists. If needed, convenient supplemental sources are available. For example, the Law Enforcement Assistance Administration, finding that voter lists have a built-in-bias toward "white affluent white-collar citizens" and against the young, the black, the less educated, and the lower paid, is supporting projects to use lists of persons with drivers licenses. G. Munsterman, et al., *Multiple Lists for Juror Selection,* App. C, pages 2-3 (L.E.A.A. 1978).

The need for review by this Court is particularly acute because District Court jury selection plans are approved by the circuit judicial council in a non-adversary proceeding. 28 U.S.C. §1863(a). The judges who approved them in that context may not be able to appreciate their flaws, as this Court held was true of "state judges perhaps too close to the day-to-day operation of their system to be

able properly to evaluate claims that the system is defective." *Rose v. Mitchell,* 443 U.S. 545, 562 (1979).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court issue a writ of certiorari to review the judgment of the Fourth Circuit.

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